No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The circuit split is real 1
B. The question presented is important and should be resolved in this case 5
C. The decision below is wrong 8

TABLE OF AUTHORITIES

Cases:

Bilski v. *Kappos*, 561 U.S. 593 (2010) 10
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 2
Donahue v. *Connolly*, 890 F. Supp. 2d 173 (D. Mass. 2012) 4
Dozier v. *Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983) 11
FDIC v. *Meyer*, 510 U.S. 471 (1994) 11
Fawcett v. *United States*, No. 4:13-CV-1828, 2014 WL 6687193 (N.D. Ohio Nov. 26, 2014) 7
Insurance Corp. of Ir., Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) 11
Janis v. *United States*, No. 1:04-cv-05812, 2011 WL 1258521 (E.D. Cal. Mar. 30, 2011) 4
Kaufman v. *Baynard*, No. 1:10-CV-0071, 2012 WL 844480 (S.D. W. Va. Feb. 3, 2012) 4
Miller v. *SFF Hazelton*, No. 1:12-CV-98, 2015 WL 1021456 (N.D. W. Va. Mar. 9, 2015) 6
Pesnell v. *Arsenault*, 543 F.3d 1038 (9th Cir. 2008) 2, 3
Rose v. *Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), cert. denied, 476 U.S. 1159 (1986) 11
United States v. *Gilman*, 347 U.S. 507 (1954) 6, 8
United States v. *Smith*, 499 U.S. 160 (1999) 7, 9
Will v. *Hallock*, 546 U.S. 345 (2006) 1, 6, 8

Cases—Continued: Page

Williams v. *FDIC*, No. 07-C-4672, 2009 WL 1209029 (N.D. Ill. Apr. 30, 2009), aff'd, 597 F.3d 820 (7th Cir. 2010) 4

Wright v. *City of Santa Cruz*, No. 13-cv-01230, 2014 WL 5830318 (N.D. Cal. Nov. 10, 2014) 4

Constitution and statutes:

U.S. Const. Amend. VIII 4, 8

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*:

28 U.S.C. 2676 ..... 1, 7, 11

28 U.S.C. 2679 9

28 U.S.C. 2679(a) 11

28 U.S.C. 2679(b) 10

28 U.S.C. 2679(b)(2) 9

28 U.S.C. 2680 ..... *passim*

28 U.S.C. 2680(a)-(n) 8

28 U.S.C. 2680(h) 2, 3

28 U.S.C. 1346(b) 11

Miscellaneous:

Restatement of Judgments (1942) 11

In the Supreme Court of the United States

No. 15-109

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Sixth Circuit's decision in this case misconstrued the Federal Tort Claims Act (FTCA) judgment bar and created a clear split of authority with the Seventh and Ninth Circuits. Respondent's efforts to deny the circuit split, minimize the significance of the judgment bar, and provide alternative rationales for the court of appeals' bottom-line conclusion all lack merit. This Court should grant certiorari and finally resolve the issue that it was unable to reach in *Will* v. *Hallock*, 546 U.S. 345 (2006).

A. The Circuit Split Is Real

The court of appeals' decision in this case creates a square split with decisions of the Seventh and Ninth Circuits. See Pet. 21-24. In both of those circuits, the FTCA judgment bar, 28 U.S.C. 2676, applies to FTCA judgments of dismissal pursuant to the exceptions to FTCA liability set forth in 28 U.S.C. 2680. Pet. 22-24. Here, in contrast, the Sixth Circuit held that the

judgment bar does not apply to such judgments. Pet. App. 6a.

1. Respondent argues that there is no "genuine disagreement" between the Sixth Circuit's decision in this case and the Ninth Circuit's decision in *Pesnell* v. *Arsenault*, 543 F.3d 1038 (9th Cir. 2008). Br. in Opp. 11 (capitalization omitted). He is wrong.

In *Pesnell*, the plaintiff had filed an FTCA claim against the United States alleging (among other things) misrepresentation in violation of Arizona law. 543 F.3d at 1041. The district court dismissed that misrepresentation claim for lack of jurisdiction pursuant to 28 U.S.C. 2680(h), which exempts such claims from the scope of the FTCA, and the Ninth Circuit affirmed. See *Pesnell*, 543 F.3d at 1041.

The plaintiff then filed a new lawsuit against the federal employees, alleging a constitutional cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and a statutory claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Pesnell*, 543 F.3d at 1040-1041. The facts alleged in those claims partially overlapped with the misrepresentation claim that had been dismissed in his earlier lawsuit against the United States. *Id.* at 1041-1042. The district court dismissed the RICO and *Bivens* claims—in their entirety—pursuant to the judgment bar. *Id.* at 1041. A Ninth Circuit panel unanimously reversed that blanket dismissal. *Id.* at 1044. In doing so, however, the court held that the FTCA judgment bar *did* bar the RICO and *Bivens* claims to the extent they involved the same misrepresentations alleged in the FTCA case. *Id.* at 1041-1042 & n.3. The court expressly stated that "[the plaintiff's] claims, including

his constitutional claims, are barred [by the FTCA judgment bar] to the extent that they rest upon the same misrepresentations alleged in the dismissed [FTCA] action." *Id.* at 1041-1042 n.3; see *id.* at 1042 ("[T]he aspect of the RICO claims based on the same alleged employees' misrepresentations is foreclosed by the judgment bar rule.").

In discussing the judgment bar, the court expressly endorsed the lengthier analysis set forth in Judge Clifton's concurring opinion. *Pesnell*, 543 F.3d at 1042 ("We agree with the concurring opinion" with respect to "the application of the judgment bar rule to this case."). In that opinion, Judge Clifton explained that "a portion of [the plaintiff's] current claim is foreclosed by the judgment bar under [Section] 2676, as my colleagues agree (*see* majority opinion, at 1042)." *Id.* at 1044; see *id.* at 1044-1047.

Respondent describes (Br. in Opp. 17, 19) the *Pesnell* decision as "confused" and "ambiguous." But the decision is clear that the judgment bar applies to FTCA judgments of dismissal for lack of jurisdiction pursuant to the exceptions to liability set forth in 28 U.S.C. 2680. Both the unanimous panel decision and the concurrence unambiguously applied the judgment bar to the dismissal of the plaintiff's prior FTCA case under Section 2680(h). See *Pesnell*, 543 F.3d at 1041-1042 & n.3, 1044. *Pesnell* squarely conflicts with the Sixth Circuit's decision here, which held that Section 2680 dismissals do not trigger the judgment bar. Pet. App. 6a.

Respondent is wrong to suggest (Br. in Opp. 19) that the district courts are generally confused over *Pesnell*'s holding. Although he correctly identifies (*ibid.*) one district court that appears to have misun-

derstood *Pesnell*, see *Williams* v. *FDIC*, No. 07-C-4672, 2009 WL 1209029, at *2 (N.D. Ill. Apr. 30, 2009), aff'd, 597 F.3d 820 (7th Cir. 2010), the other cases he cites—along with numerous others—agree that *Pesnell* holds that the FTCA judgment bar *does* apply to FTCA judgments of dismissal for lack of jurisdiction under Section 2680. See *Donahue* v. *Connolly*, 890 F. Supp. 2d 173, 184 (D. Mass. 2012) (quoting Judge Clifton's concurrence and correctly explaining *Pesnell*'s holding that jurisdictional dismissals based on an "exception" to FTCA liability trigger the judgment bar); see also, *e.g.*, *Wright* v. *City of Santa Cruz*, No. 13-cv-01230, 2014 WL 5830318, at *3 n.5 (N.D. Cal. Nov. 10, 2014); *Kaufman* v. *Baynard*, No. 1:10-CV-0071, 2012 WL 844480, at *9 (S.D. W. Va. Feb. 3, 2012); *Janis* v. *United States*, No. 1:04-cv-05812, 2011 WL 1258521, at *2 (E.D. Cal. Mar. 30, 2011).

2. Respondent also denies (Br. in Opp. 14) that there is a conflict between the Sixth and Seventh Circuits. But there is no doubt that those circuits have announced different conclusions to the question presented in the petition. Whereas the Seventh Circuit applies the FTCA judgment bar to judgments of dismissal under 28 U.S.C. 2680, the Sixth Circuit does not. See Pet. 22-23. Respondent does not—and cannot—deny that if he had brought his Eighth Amendment *Bivens* claim within the Seventh Circuit, that claim would have been dismissed pursuant to the judgment bar.

Respondent points out (Br. in Opp. 14-16) that the Sixth Circuit refuses to apply the judgment bar on the grounds that the FTCA judgment bar never applies to jurisdictional dismissals, whereas the Seventh Circuit holds that Section 2680 dismissals are not jurisdic-

tional in the first place. He observes (*id.* at 15) that "there is no conflict" over "whether [Section] 2676 applies to jurisdictional dismissals—because the Seventh Circuit has never answered that question."

That is true, but beside the point. As noted above, the circuits are divided over whether the FTCA judgment bar applies to dismissals under Section 2680. The fact that the circuits have approached that question in different ways—and that they disagree over whether the Section 2680 exceptions are jurisdictional—cannot obscure the fact that they disagree as to the proper resolution of the question presented here. Indeed, that the Circuits are divided not just on result but on rationale is yet another reason that certiorari is warranted.

B. The Question Presented Is Important And Should Be Resolved In This Case

Respondent also urges (Br. in Opp. 20-27) this Court to deny review for a variety of prudential reasons. None of his concerns has merit.

1. Respondent is mistaken to suggest that the proper application of the judgment bar is unimportant. This Court concluded otherwise when it granted certiorari—on the exact same question presented—in *Will*. Although respondent argues (Br. in Opp. 21-23) that the judgment bar is less significant now than it was before passage of the Westfall Act in 1988, nothing has happened to diminish the importance of the bar since this Court granted review in *Will* in 2005. If anything, the judgment bar appears to have become *more* significant: A search of the Westlaw database reveals that the judgment bar has been cited in roughly 100 cases since *Will* was granted—nearly

twice as many times as it was cited in the entire six preceding decades.

Respondent points out (Br. in Opp. 20-21) that few appellate decisions have addressed the judgment bar since *Will*. But that is not a sign that the issue lacks importance. Rather, it likely reflects *Will*'s holding that when a district court denies a federal employee's motion to dismiss a tort claim based on the FTCA judgment bar, the employee may not obtain interlocutory review of that decision. 546 U.S. at 347. Instead, the employee must wait to raise the judgment bar on appeal until after a final judgment in the case. By then, however, the employee may have already won a favorable judgment, either on the merits or based on qualified immunity. In such circumstances, there may be no need to address the judgment bar on appeal—even though the employee will have been deprived of the protections that Congress intended the judgment bar to provide. See, *e.g.*, *id.* at 354 (noting judgment bar's goal of "avoiding duplicative litigation"); *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (noting goals both of avoiding "very substantial burden[s]" involved with defending tort suits against federal employees and of avoiding adverse impact of such litigation "upon the morale" of government employees). The potential for such evasion of appellate review makes it especially important for this Court to provide guidance to district courts on how to correctly apply the bar in the first place.

Notably respondent's focus on the number of appellate rulings ignores the significant disagreement among district courts over the question presented here. See Pet. 24 n.14 (citing cases); see also, *e.g.*, *Miller* v. *SFF Hazelton*, No. 1:12-CV-98, 2015 WL

1021456, at *2-*3 (N.D. W. Va. Mar. 9, 2015) (applying judgment bar to Section 2680 dismissal); *Fawcett* v. *United States*, No. 4:13-CV-1828, 2014 WL 6687193, at *3 (N.D. Ohio Nov. 26, 2014) (following Sixth Circuit's decision here). Those divisions will only be resolved if this Court grants review.

2. Respondent also suggests (Br. in Opp. 24) that this Court should deny review so as to permit "[f]urther percolation" on the question presented. But no such percolation is warranted. The question presented has divided the circuits for at least a decade, and there is little reason to believe that any of the courts of appeals that have already weighed in will change their mind.

Respondent points out (Br. in Opp. 24-26) that courts have not yet addressed several potential arguments for holding the judgment bar inapplicable to Section 2680 dismissals, including (1) the argument that the judgment bar does not apply to *Bivens* claims at all, and (2) the argument that the judgment bar does not apply to Section 2680 dismissals because *no* provision of the FTCA applies to such cases. But respondent does not point to any case in which a litigant has raised either of these arguments, and there is little reason to expect the courts to address them anytime soon. Both arguments are also meritless. The first (which respondent does not even raise himself) requires creating a broad and atextual exception to Section 2676, and the second (which respondent does raise, see pp. 8-10, *infra*), contradicts other FTCA provisions and this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1999). Neither provides a reason for this Court to deny review here.

3. Respondent also points out (Br. in Opp. 26-27) that this case is in an interlocutory posture. But the judgment-bar question is squarely presented; it turns on pure legal issues; and the proper resolution of those issues will bring the litigation over the Eighth Amendment *Bivens* claim to an end. Although respondent is correct that the judgment bar would not ultimately matter if petitioners prevail in the trial court, that ignores that the whole point of the judgment bar is to avoid such trials in the first place. See *Will*, 546 U.S. at 354; *Gilman*, 347 U.S. at 512 n.2.

4. Finally, respondent warns (Br. in Opp. 27) that because he only recently retained counsel to represent him in this case, there is "a heightened risk of unknown vehicle issues or other potential barriers to reaching the issue presented." But he does not identify any such vehicle problems, and petitioners are aware of none.

C. The Decision Below Is Wrong

Respondent advances (Br. in Opp. 28-40) a series of arguments in defense of the court of appeals' bottom-line conclusion that the FTCA judgment bar does not bar his claim. None of those arguments has merit.

1. Respondent's primary contention (Br. in Opp. 28-31) relies upon Section 2680's introductory language stating that "[t]he provisions of this chapter"—*i.e.*, Chapter 171 of Title 28 of the United States Code—"shall not apply to" any of the types of claims expressly identified in Section 2680(a)-(n). 28 U.S.C. 2680. He reasons that because the FTCA judgment bar is one of the "provisions of this chapter," that bar does not apply to FTCA claims dismissed under Section 2680. Respondent defends (Br. in Opp. 28-29) this argument (which no court has adopted) on the

grounds that it conforms to the "plain text" and "simple words" of Section 2680.

But respondent's textual argument is inconsistent with this Court's decision in *Smith*. There, the Court expressly held that 28 U.S.C. 2679—which, among other things, makes the FTCA the exclusive remedy for torts committed by federal employees within the scope of their employment, see 28 U.S.C. 2679(b)(2)—applies to claims that fall within the enumerated exceptions to FTCA liability set forth in 28 U.S.C. 2680. *Smith*, 499 U.S. at 161-162, 165-167. Section 2679 appears in Chapter 171 of Title 28, just like the judgment bar. *Smith*'s holding therefore does not make sense if respondent is right that Section 2680 renders the enumerated claims exempt from all of "[t]he provisions of this chapter."

To square his interpretation of Section 2680 with *Smith*, respondent turns to the FTCA's history. He points out (Br. in Opp. 30) that Section 2679 was enacted as part of the Westfall Act in 1988, and he argues that it should therefore not be considered one of "[t]he provisions of this chapter" under Section 2680. Instead, respondent appears to suggest (*id.* at 31) that the only "provisions of this chapter" that count for purposes of Section 2680 are those that were "part of the FTCA as originally enacted." His argument—which began as an effort to implement Section 2680's "simple words" (*id.* at 29)—thus ends up rewriting the statutory phrase "[t]he provisions of this chapter" to mean "[t]he provisions of this chapter, *but only insofar as they appeared in the original FTCA*." That contention fails as a textual matter, and it contravenes the principle that statutory provisions should be interpreted as a coherent whole, even when they have

been enacted at different times. See, *e.g.*, *Bilski* v. *Kappos*, 561 U.S. 593, 607-608 (2010).

The better reading of Section 2680—and the only reading consistent with *Smith*—is that the provision's introductory "shall not apply" language both exempts the enumerated categories of tort claims from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the liability of the United States in tort. But that provision does not exempt those categories of claims from other provisions of the FTCA—such as Section 2679(b) or the judgment bar—that expressly limit the remedies that tort claimants may pursue outside of the FTCA.

2. Respondent also advances (Br. in Opp. 28-40) a series of arguments to support the court of appeals' bottom-line conclusion that the "judgment" dismissing his FTCA case does not qualify as a "judgment" for purposes of the FTCA judgment bar. Petitioners touched on most of those arguments in the petition and will address them more fully on the merits if this Court grants review. For present purposes, however, two points are worth emphasizing.

First, although respondent asserts (Br. in Opp. 33) that the FTCA judgment bar only applies to judgments that are "capable of having some preclusive effect" under common-law res judicata principles, he is wrong to suggest that a Section 2680 dismissal lacks such preclusive effect simply because it also qualifies as a dismissal for lack of subject-matter jurisdiction. As explained in the petition (Pet. 13-17), dismissal of a case under Section 2680 reflects a substantive judgment, by Congress, that the United States should not be liable in the circumstances at issue. Such a dismissal is appropriately characterized as "on the merits,"

and it is entitled to res judicata effect even though it also reflects the district court's lack of jurisdiction. See, *e.g.*, *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.) (explaining that res judicata attaches to judgments "on the merits," even if they also reflect a court's lack of "jurisdiction"), cert. denied, 476 U.S. 1159 (1986). Respondent is wrong to assert (Br. in Opp. 33) the existence of a blanket rule that "[d]ismissals for lack of jurisdiction *never* have claim-preclusive effect." See, *e.g.*, *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("[P]rinciples of res judicata apply to jurisdictional determinations—both subject matter and personal."); *Rose*, 778 F.2d at 79-80; *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (Scalia, J.) ("[T]he doctrine of *res judicata* applies to dismissal for lack of jurisdiction as well as for other grounds."); Restatement of Judgments § 49 cmt. b (1942).

Second, respondent is also wrong to argue (Br. in Opp. 34-35) that when an FTCA action is dismissed for lack of jurisdiction under Section 2680, that action does not qualify as "an action under section 1346(b)" for purposes of the FTCA judgment bar. 28 U.S.C. 2676. That argument is foreclosed by this Court's construction of similar language in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). There, the Court held that Section 2679(a)'s phrase "cognizable under section 1346(b)" encompasses all tort claims that satisfy the "six elements" set forth in Section 1346(b), regardless of whether the claim is "cognizable *under the FTCA* generally." *Meyer*, 510 U.S. at 477 & n.5; see generally Pet. Br. 31-38, *Will*, *supra* (No. 04-1332) (responding to same argument in greater detail). Respondent

makes no effort to explain why *Meyer*'s analysis does not govern the similar language in the FTCA judgment bar.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2015